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In the Supreme Court of the United States

OCTOBER TERM, 1975

THOMAS S. KLEPPE, SECRETARY OF THE INTERIOR,
APPELLANT
v.
STATE OF NEW MEXICO, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO

REPLY BRIEF FOR THE SECRETARY OF THE INTERIOR

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1. Appellees claim (Br. 8–9, 24–27) that the Wild Free-Roaming Horses and Burros Act is beyond Congress' powers under the Property Clause because the State of New Mexico has not ceded legislative jurisdiction over the federal lands in question to the United States. Apparently the argument is this: if the United States had exclusive legislative jurisdiction over the federal lands, the State could not enforce its estray laws[1] in these areas;[2] therefore, in the absence of such exclusive federal jurisdiction, Congress

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[1] J. S. App. 21a.

[2] See, *e.g.*, *Chalk* v. *United States*, 114 F. 2d 207 (C.C.A. 4), certiorari denied, 312 U.S. 679.

has no authority to legislate with respect to federal lands, at least when such federal legislation would be inconsistent with state law; the Act in question is therefore unconstitutional.

Appellees' argument confuses Congress' derivative legislative powers, which are not involved in this case, with its powers under the Property Clause, which are involved here. As to the former, the United States may acquire derivative legislative powers from a State by consensual acquisition of land pursuant to Article I, Section 8, Clause 17 of the Constitution[3] (see, *e.g., United States* v. *Mississippi Tax Commission,* 412 U.S. 363, 369–370); or by a nonconsensual acquisition followed by the State's subsequent "cession of legislative authority and political jurisdiction" over the land (*Fort Leavenworth R.R.* v. *Lowe,* 114 U.S. 525, 541–542; *Paul* v. *United States,* 371 U.S. 245, 264).[4] In either situation the legislative jurisdiction acquired may range across a broad spectrum, from

[3] This provides that Congress shall have power: "To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings * * *."

[4] A third, less common means to possession of such authority is by reservation by the United States of legislative jurisdiction over certain areas in connection with the admission of a State into the Union. See *Langford* v. *Monteith,* 102 U.S. 145; *Fort Leavenworth R.R.* v. *Lowe,* 114 U.S. 525, 526; *Jurisdiction Over Federal Areas Within the States,* Report of the Interdepartmental Committee for the Study of Jurisdiction Over Federal Areas Within the States, Part II, A Text of the Law of Legislative Jurisdiction 3 (1957).

exclusive federal jurisdiction, with no residual state police power (*e.g., Pacific Coast Dairy, Inc.* v. *Department of Agriculture of California,* 318 U.S. 285), to concurrent or partial federal legislative jurisdiction, which may allow the State to exercise certain authority, such as the taxation of property (*e.g., Paul* v. *United States, supra; Collins* v. *Yosemite Park Co.,* 304 U.S. 518; *James* v. *Dravo Contracting Co.,* 302 U.S. 134, 147–149).[5]

Although the federal government's acquisition of derivative jurisdiction in an area can affect the State's power to legislate with respect to it,[6] the power of Congress to legislate under the Property Clause is in no way affected. The Court explained this in *Utah Power & Light Co.* v. *United States,* 243 U.S. 389, 403–405,[7] from which we quote at length:

[5] As the Court explained in *Paul* v. *United States, supra,* 371 U.S. at 264–265: "Thus if the United States acquires with the 'consent' of the state legislature land within the borders of that State by purchase or condemnation for any of the purposes mentioned in Art. I, § 8, cl. 17, or if the land is acquired without such consent and later the State gives its 'consent,' the jurisdiction of the Federal Government becomes 'exclusive.' * * * In either event——whether the land is acquired by purchase or condemnation on the one hand or by cession on the other—a State may condition its 'consent' upon its retention of jurisdiction over the lands consistent with the federal use."

[6] Of course, if the federal government has acquired exclusive jurisdiction under Article I, Section 8, Clause 17 of the Constitution, this "bars state regulation without specific congressional action." *Paul* v. *United States, supra,* 371 U.S. at 263.

[7] In that case the United States sued to enjoin the continued occupancy by the power company of lands the federal government owned but over which it had not acquired derivative legislative jurisdiction.

The first position taken by the defendants is that their claims must be tested by the laws of the State in which the lands are situate rather than by the legislation of Congress, and in support of this position they say that lands of the United States within a State, when not used or needed for a fort or other governmental purpose of the United States, are subject to the jurisdiction, powers and laws of the State in the same way and to the same extent as are similar lands of others. To this we cannot assent. Not only does the Constitution (Art. IV, § 3, cl. 2) commit to Congress the power "to dispose of and make all needful rules and regulations respecting" the lands of the United States, but the settled course of legislation, congressional and state, and repeated decisions of this court have gone upon the theory that the power of Congress is exclusive and that only through its exercise in some form can rights in lands belonging to the United States be acquired. True, for many purposes a State has civil and criminal jurisdiction over lands within its limits belonging to the United States, but this jurisdiction does not extend to any matter that is not consistent with full power in the United States to protect its lands, to control their use and to prescribe in what manner others may acquire rights in them. Thus while the State may punish public offenses, such as murder or larceny, committed on such lands, and may tax private property, such as live stock, located thereon, it may not tax the lands themselves or invest others with any right whatever in them. * * * And so we are of opinion that the inclusion within a State of

> lands of the United States does not take from Congress the power to control their occupancy and use, to protect them from trespass and injury and to prescribe the conditions upon which others may obtain rights in them, even though this may involve the exercise in some measure of what commonly is known as the police power. "A different rule," as was said in *Camfield* v. *United States,* [167 U.S. 518, 526], "would place the public domain of the United States completely at the mercy of state legislation."[8]

In short, Congress' power over federal lands is derived from the Property Clause and does not turn upon the degree to which a State may have relinquished its own police powers. See, in addition to the cases cited above, *Penn Dairies, Inc.* v. *Milk Control Commission of Pennsylvania,* 318 U.S. 261, 269.[9] Con-

[8] See also *Mason Co.* v. *Tax Commission of Washington,* 302 U.S. 186, 197, in which the Court upheld state taxation of income earned by contractors engaged by the federal government to build the Grand Coulee Dam (emphasis added): "No question is presented as to the constitutional authority of Congress to provide for this enterprise or to acquire the lands necessary or appropriate for that purpose. There is no contention that the State may interfere with the conduct of the enterprise. *The question of exclusive territorial jurisdiction is distinct.* That question assumes the absence of any interference with the exercise of the functions of the Federal Government and is whether the United States has acquired exclusive legislative authority so as to debar the State from exercising any legislative authority, including its taxing and police power, in relation to the property and activities of individuals and corporations within the territory."

See also *Ohio* v. *Thomas,* 173 U.S. 276, 283.

[9] The cases relied upon by appellees are fully consistent with this view. In *Surplus Trading Company* v. *Cook,* 281 U.S. 647, the

gress' exercise of its Property Clause powers and the State's exercise of its municipal sovereignty may occur simultaneously and harmoniously in the same area; it is not necessary for either sovereign to occupy the field exclusively before it may act. *Ex parte Siebold*, 100 U.S. 371, 392–395. But when there is a conflict the Supremacy Clause dictates that the powers of the national government are paramount. *M'Culloch* v. *Maryland*, 4 Wheat. 316.

Court ruled simply that a State could not tax activities occurring on lands over which the federal government had exclusive legislative jurisdiction under Clause 17; other federal lands within a State "remain part of her territory and within the operation of her laws, save that the latter cannot affect the title of the United States or embarrass it in using the lands or interfere with its right of disposal" (281 U.S. at 650).

In *Colorado* v. *Toll*, 268 U.S. 228, the superintendent of the Rocky Mountain National Park had by regulation limited to one company the right to operate automobiles for hire over highways in the park. The statute creating the park, however, had expressly reserved the rights of the State over the roads (228 U.S. at 231), and the state claimed it had never surrendered such rights—an allegation, the Court said, it was entitled to attempt to prove: "As the defendant is undertaking to * * * establish a monopoly in a matter as to which, if the allegations of the bill are maintained, the State has not surrendered its legislative power, a cause of action is disclosed if we do not look beyond the bill, and it was wrongly dismissed" (*ibid.*). At most this case stands for the proposition that the United States may not exercise routine police powers on federal lands when by federal statute those powers have been reserved to the State and the State has not relinquished them. It does not hold that Property Clause powers may not be exercised absent state cession of legislative jurisdiction.

Van Brocklin v. *Tennessee*, 117 U.S. 151, firmly supports our position. There the Court held that all property owned by the United States was exempt from state taxation, even though the

We do not, then, make the claim attributed to us by appellees (Br. 16) "that the Property Clause totally exempts federal lands within state borders from state legislative powers, state police powers, and all rights and powers of local sovereignty and jurisdiction of the states." The constitutionality of the Wild Free-Roaming Horses and Burros Act rests on Congress' power to protect these animals through its plenary authority over the federal lands conferred by the Property Clause, not on the basis that the Clause itself bars the operation of state laws on federal

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State had not acquiesced in the federal acquisition of the property nor ceded exclusive jurisdiction to the United States. The statement by the Court that "the provisions which speak of the exemption of property of the United States from taxation, in the various acts of Congress admitting States into the Union * * * are but declaratory, and confer no new right or power upon the United States" (117 U.S. at 167), was made in answer to the contention that a constitutional immunity from taxation could not have existed if provisions assuring immunity were deemed necessary in various statehood acts; it was meant, in short, to affirm rather than to detract from the federal government's power with respect to the States.

In *Wilson* v. *Cook*, 327 U.S. 474, the Court held simply that a State might assess taxes upon activities on federal land purchased under state and federal statutes recognizing the continuation of such rights in the State; and that similar taxing authority in the State existed over private activities on federal lands which were within the State upon the admission to the Union and over which it had not ceded its legislative powers. The power of the federal government to displace state police powers by appropriate congressional action was not in issue, and the Court was careful to point out that whatever legislative authority the State might possess stopped short of empowering it to act in "conflict with the powers reserved to the United States by the Constitution" (*id.* at 487).

lands.[10] The Act in issue "does not represent an exercise of a general control over public policy in a State[,] but instead only an exercise of the complete power which Congress has over particular public property entrusted to it" (*United States* v. *San Francisco*, 310 U.S. 16, 30).

In exercising that power, Congress had authority under Article I, Section 8, Clause 18 of the Constitution "[t]o make all Laws which shall be necessary and proper for carrying [it] into Execution * * *." The end is legitimate—to manage and control the public lands—and the means adopted to this end are appropriate—regulation of the animals that live and feed upon the public lands. The Constitution requires no more. *M'Culloch* v. *Maryland, supra*, 4 Wheat. at 421.[11]

2. Appellees also assert (Br. 5–7, 10–11, 30–31) that the Wild Free-Roaming Horses and Burros Act

[10] In other words, the "states may prescribe police regulations applicable to public land areas, *so long as the regulations are not* arbitrary, or *inconsistent with applicable congressional enactments.*" *McKelvey* v. *United States*, 260 U.S. 353, 359 (emphasis added).

[11] For reasons similar to those discussed above and in our main brief (pp. 12–20), the Department of the Interior concluded that it was constitutional for the Secretary, pursuant to congressional authorizations, to manage and control resident species of wildlife that inhabit federal lands within the National Wildlife Refuge System, notwithstanding any state laws to the contrary. See 71 I.D. 469 (citing examples).

Also, the Secretary of Agriculture has the power, pursuant to congressional authorization under the Property Clause, to keep animals from entering national forests, *McVay* v. *United States*, 481 F. 2d 615 (C.A. 5), as well as to protect animals such as wild horses and burros that inhabit the national forests. See Sections 2 and 3 of the Act, 16 U.S.C. (Supp. IV) 1332, 1333 (J.S. App. 14a–17a).

is unconstitutional because Congress erred in finding that the animals "are fast disappearing from the American scene" (Section 1, 16 U.S.C. (Supp. IV) 1331).

The short answer to this argument is that Congress' power to protect these animals under the Property Clause may be validly exercised whether the population of wild horses and burros is increasing or decreasing. These animals are part of the public domain and Congress would have no less power to regulate them even if they were flourishing to the extent appellees suggest.

In any event, there was ample evidence before Congress to allow it reasonably to conclude that the animals were in fact decreasing in number.[12] See, *e.g.*, Hearings on H.R. 795, H.R. 5375 and Related Bills (Protection of Wild Horses on Public Lands) before the Subcommittee on Public Lands of the House Committee on Interior and Insular Affairs, 92d Cong., 1st Sess. 1–2, 7, 11–14, 17, 26–32, 35, 80, 87–88, 101, 103, 134–136, 139–141 (1971) ("Hearings"). To cite but one example, the Department of the Interior advised Congress that a bill authorizing management of wild horses was required "to assure the survival of floundering herds" since "confinement caused by the development of the West has changed the environmental patterns of these animals * * * [and] natural processes have operated to deter the survival of a thriving

[12] We cited in our main brief (p. 5) the evidence in this case and the evidence before Congress during the 1974 oversight hearings indicating, in the words of the state director of the Bureau of Land Management, that in New Mexico wild horses and burros were "proving almost unknown on federal public lands" (App. 83).

population" (Hearings, *supra,* at 7). Congress' agreement with this and other representations that in fact the numbers of wild horses and burros were dwindling is not open to challenge here: "[I]t is not the province of a court to hear and examine evidence for the purpose of deciding again a question which the legislature has already decided." *Clark* v. *Paul Gray, Inc.,* 306 U.S. 583, 594.[13]

Beyond that, Congress also found that wild horses and burros "are living symbols of the historic and pioneer spirit of the West" and that "they contribute to the diversity of life forms within the Nation and enrich the lives of the American people" (Section 1, 16 U.S.C. (Supp. IV) 1331). Appellees do not challenge these findings. Since the animals are "an integral part of the natural system of the public lands" (*ibid.*), they are surely a proper object of Congress' exercise of its Property Clause powers.

3. Appellees contend that the Wild Free-Roaming Horses and Burros Act may not be sustained under the Commerce Clause because Congress did not expressly rely on the Commerce Clause in the Act itself and made no findings indicating such reliance, and because the evidence of the connection between the animals in question and interstate commerce is insufficient.

[13] The Act itself provides for periodic congressional review of its administration. See Section 10, 16 U.S.C. (Supp. IV) 1340, set out in J.S. App. 20a. If particular areas are overpopulated, the Secretary is authorized to take appropriate action to control the wild horses and burros in those areas. Section 3(b) and (c), 16 U.S.C. (Supp. IV) 1333(b), (c), set out in J.S. App. 16a–17a.

In our view, it cannot be fatal to an enactment of Congress otherwise valid under a particular constitutional grant of authority that Congress did not specifically invoke it. There is a "strong presumptive validity that attaches to an Act of Congress" (*United States* v. *National Dairy Corporation,* 372 U.S. 29, 32), so strong that "[l]egislatures are presumed to have acted constitutionally even if the source materials normally resorted to for ascertaining their grounds for action are otherwise silent" (*McDonald* v. *Board of Election Commissioners of Chicago,* 394 U.S. 802, 809; see also *Hardware Dealers Mutual Fire Insurance Company* v. *Glidden Company,* 284 U.S. 151, 158–159). The constitutionality of a given statute is a question of power rather than intent, and if Congress possesses the requisite power to act it does not matter whether that power is acknowledged or overlooked. Cf. *Daniel* v. *Family Security Life Insurance Company,* 336 U.S. 220, 224, and cases cited therein. It follows that, while reference to the Commerce Clause and explicit congressional findings may aid a court in determining whether the powers granted by the Clause have been exceeded, the giving of such assistance is not a necessary prerequisite to the constitutional exercise of Commerce Clause authority. *United States* v. *Carolene Products Company,* 304 U.S. 144, 152.[14]

[14] In that case, involving Congress' power to forbid interstate commerce in adulterated milk, the Court said that "[e]ven in the absence of such aids the existence of facts supporting the legislative judgment is to be presumed, for regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of the facts made known or gen-

The constitutionality of the Wild Free-Roaming Horses and Burros Act under the Commerce Clause thus turns solely upon whether Congress has power to act by virtue of the nexus between the subject matter of the legislation and interstate commerce. "[T]he only function of courts is to determine whether the particular activity regulated or prohibited is within the reach of the federal power" (*United States* v. *Darby*, 312 U.S. 100, 120–121). For the reasons stated in our main brief—the commercial exploitation of the animals,[15] the passage between the States of the live animals themselves,[16] and the interstate travel of persons interested in observing them—the effect on interstate commerce is, we submit, sufficient to permit Congress to enact necessary and proper legislation to carry out its powers under the Commerce Clause, and thus the Act may be sustained under that grant of authority as well as under the Property Clause.

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erally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators" (304 U.S. at 152). The principle extends beyond "legislation affecting ordinary commercial transactions," we submit, for "the burden of establishing the unconstitutionality of a statute rests on him who assails it" (*Metropolitan Company* v. *Brownell*, 294 U.S. 580, 584) and that burden cannot be discharged merely by showing that Congress did not invoke or make findings under a constitutional grant of power that has otherwise been validly exercised.

[15] Cf. *Champion* v. *Ames* (The Lottery Case), 188 U.S. 321.

[16] See *Thornton* v. *United States*, 271 U.S. 414, 425 (cattle passing between states constituted interstate commerce even though the passage was not for commercial reasons).

CONCLUSION

For the foregoing reasons, as well as the reasons stated in our opening brief, the judgment of the district court should be reversed.[17]

Respectfully submitted.

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[17] Appellees included in their complaint a second cause of action, which the three-judge district court did not reach. They alleged that in enforcing the Act the Secretary of the Interior violated 42 U.S.C. 1983 and 1985 and various constitutional amendments, and that there is no conflict between the Act and New Mexico's estray laws since Section 5 of the Act, 16 U.S.C. (Supp. IV) 1335, provides that the validity of private claims to animals subject to the Act are to be judged according to State law. If this Court reverses the judgment below, on remand it will have to be determined whether these allegations present sufficiently substantial constitutional claims as to require that they be decided by a three-judge district court. See *Hagans* v. *Lavine*, 415 U.S. 528.

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